Trace Consultant Services Sdn Bhd v Koperasi Mahadaya Bhd (KPN-20) & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-288–4 OF 2012
VARGHESE GEORGE J
25 JANUARY 2013

Civil Procedure — Striking out — Whether action against defendant should be struck out — Whether action frivolous, obviously unsustainable and doomed to failure if tried — Whether court when called upon to strike out action under O 18 r 19 of the Rules of the High Court 1980 considered thrust of whole case under challenge — Whether court did not examine each paragraph of pleadings to determine what averments were frivolous, vexatious or abuse of process of court

The first defendant ('Mahadaya') owned several pieces of land one of which ('the charged land') was charged to the second defendant ('RHB') as security for a loan granted to a third party ('Woh Heng'). The plaintiff entered into a joint venture agreement ('JV') with Mahadaya to develop the latter's lands. When RHB took steps to auction the charged land to recover monies owing to it by Woh Heng, the plaintiff took out an injunction to prevent the bank from doing so. The plaintiff contended that RHB was party to a collateral contract or tripartite agreement between the plaintiff, RHB and Mahadaya under which (i) in consideration for the plaintiff taking over Mahadaya's responsibility to settle monies owing to RHB, the latter agreed to Mahadaya's participation in the JV with the plaintiff and (ii) that RHB had expressly or impliedly consented to transfer to the plaintiff its right to foreclose on the charged land. In the instant action the plaintiff sought declarations that the alleged collateral contract was valid and binding and that the plaintiff was entitled to redeem the charged land in place of Mahadaya. The plaintiff's contention that a collateral contract or tripartite agreement existed was wholly based upon a letter dated 24 February 2000 ('the letter') which Mahadaya had allegedly sent to RHB making reference to the JV. RHB denied any collateral contract or tripartite agreement existed and applied for the action against bank to be struck out. As the application was made pursuant to O 18 r 19 of the Rules of the High Court 1980, the plaintiff, inter alia, raised two procedural objections ie (i) that the application was defective for failure to state that it was made pursuant to r 19(1) and (ii) that RHB failed to particularly identify which averments in the statement of claim were scandalous, vexatious, frivolous or otherwise an abuse of process of court.

Held, allowing the application:

(1) The plaintiff's case against RHB was doomed to failure even if it was

ordered to be fully tried. The action was obviously unsustainable, an abuse of process of court and wholly frivolous (see para 33).

(2) No collateral contract came into existence by virtue of the 24 February 2000 letter. It was a far-fetched smokescreen to frustrate the bank from proceeding with its statutory right to foreclose on the charged land (see para 33).

(3) The letter of 24 February 2000 by itself could not and did not per se establish any contractual relationship directly between the plaintiff and the bank. Nothing was shown that even remotely lent any credible support to the plaintiff's assertion that there existed a collateral or tripartite contract binding on the bank (see para 32).

(4) There was no provision in the National Land Code ('NLC') that allowed the chargor or the ultimate debtor (in a third party charge situation) to transfer responsibility for settlement of the debt to another in such summary fashion. Under the NLC only the chargee was allowed to transfer the benefit of the charge to another (s 219), but not the chargor (see para 31).

(5) When the court was called upon to consider whether an action was frivolous, vexatious or amounted to an abuse of process of court, it necessarily demanded an assessment by the court of the whole of the case that was being challenged. Whether it was a plain and obvious case to strike out could only be decided if the overall thrust of the case was scrutinised and this was not to be artificially limited to a paragraph by paragraph analysis of the pleadings (see para 18).

(6) The omission to insert sub-r (1) after r 19 of O 18 was a typographical slip. The technical defect was no cause for the plaintiff or its solicitors to be confused or misled as to the nature of the bank's application to be met by the plaintiff (see para 12).

[Bahasa Malaysia summary

Defendan pertama ('Mahadaya') memiliki beberapa bidang tanah yang mana salah satu daripadanya ('tanah yang digadai) kepada defendan kedua ('RHB') sebagai jaminan untuk pinjaman yang diberikan kepada pihak ketiga ('Woh Heng'). Plaintif memasuki perjanjian usaha sama ('perjanjian') dengan Mahadaya untuk membangunkan tanah-tanahnya. Apabila RHB mengambil langkah untuk melelong tanah yang digadai tersebut untuk mendapatkan kembali wang yang masih berhutang kepadanya oleh Woh Heng, plaintif memohon injunksi untuk menghalang bank daripada berbuat sedemikian. Plaintif berhujah bahawa RHB adalah pihak kepada kontrak kolateral atau perjanjian tiga pihak di antara plaintif, RHB dan Mahadaya di bawah mana (i) sebagai balasan bagi plaintif mengambil alih tanggungjawab Mahadaya untuk menyelesaikan wang yang masih berhutang dengan RHB, RHB bersetuju

untuk penyertaan Mahadaya di dalam perjanjian tersebut dengan plaintif dan (ii) bahawa RHB secara nyata atau tersirat bersetuju untuk memindahkan kepada plaintif haknya untuk merampas tanah yang digadai tersebut. Dalam tindakan ini plaintif memohon perisytiharan bahawa kontrak kolateral yang didakwa tersebut sah dan mengikat dan bahawa plaintif berhak untuk menebus tanah yang digadai tersebut sebagai ganti Mahadaya. Hujahan plaintif bahawa kontrak kolateral atau perjanjian tiga pihak wujud hanya berdasarkan semata-mata atas surat bertarikh 24 Februari 2000 ('surat tersebut') yang mana Mahadaya telah menghantarkan kepada RHB membuat rujukan kepada perjanjian tersebut. RHB menafikan apa-apa kontrak kolateral atau perjanjian tiga pihak wujud dan memohon untuk tindakan terhadap bank dibatalkan. Memandangkan permohonan tersebut dibuat berikutan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980, plaintif, antara lain, membangkitkan dua bantahan prosedur iaitu (i) bahawa permohonan tersebut adalah cacat kerana gagal untuk menyatakan bahawa ia dibuat berikutan kepada k 19(1) dan (ii) bahawa RHB gagal untuk mengenal pasti terutamanya penegasan yang mana di dalam penyataan tuntutan adalah bersifat skandal, menyusahkan, remeh atau sebaliknya penyalahgunaan proses mahkamah.

Diputuskan, membenarkan permohonan:

(1) Kes plaintif terhadap RHB ditakdirkan gagal walaupun jika ia diperintahkan untuk dibicarakan secara penuh. Tindakan tersebut nyata tidak dapat dikekalkan, penyalahgunaan proses mahkamah dan remeh keseluruhannya (lihat perenggan 33).

(2) Tiada kontrak kolateral wujud berdasarkan surat 24 Februari 2000. Ia adalah sukar untuk menghalang bank tersebut daripada meneruskan dengan hak statutorinya untuk merampas tanah yang digadai tersebut (lihat perenggan 33).

(3) Surat 24 Februari 2000 dengan sendirinya tidak dapat dan tidak dengan sendiri membuktikan apa-apa hubungan kontrak secara langsung di antara plaintif dan bank. Tiada apa-apa yang ditunjukkan yang memberi apa-apa sokongan yang boleh dipercayai kepada penegasan plaintif bahawa ia wujud kontrak kolateral atau tiga pihak mengikat ke atas bank (lihat perenggan 32).

(4) Tiada peruntukan di dalam Kanun Tanah Negara ('KTN') yang membenarkan penggadai atau penghutang utama (di dalam keadaan gadaian pihak ketiga) untuk memindah tanggungjawab untuk penyelesaian hutang kepada pihak yang lain dalam cara yang ringkas sedemikian. Di bawah KTN hanya pemegang gadaian dibenarkan untuk memindah faedah gadaian tersebut kepada pihak lain (s 219), tetapi bukan penggadai (lihat perenggan 31).

(5) Apabila mahkamah diminta untuk mempertimbangkan sama ada

tindakan adalah remeh, menyusahkan atau merupakan penyalahgunaan proses mahkamah, adalah perlu memohon penilaian daripada mahkamah terhadap keseluruhan kes yang dicabar. Sama ada ia adalah kes yang jelas dan nyata untuk dibatalkan hanya boleh ditentukan jika teras keseluruhan kes diteliti dan ini tidak bukan terhad secara buatan kepada analisis perenggan ke perenggan pliding (lihat perenggan 18).

(6) Ketinggalan untuk memasukkan sub-kaedah (1) selepas k 19 A 18 adalah typographical slip. Kecacatan teknikal bukan sebab untuk plaintif atau peguam-peguamnya dikelirukan atau ditipu kerana sifat permohonan bank yang mesti dipenuhi oleh plaintif (lihat perenggan 12).]

Notes

For cases on whether action against defendants should be struck out, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8153–8154.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 2 AMR 34, SC (refd)

Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd [1999] 1 SLR 14, CA (refd)

Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Contraction Sdn Bhd [1993] 3 MLJ 433, HC (refd)

Mohamed Moidu b Mohamed & Anor v Hassan b Kadir & Ors [1997] MLJU 31, HC (refd)

Tan Swee Hoe Co Ltd v Ali Hussian Bros [1980] 2 MLJ 16, FC (refd)

Legislation referred to

National Land Code s 219
Rules of Court 2012
Rules of the High Court 1980 Order 1A, O 18 r 19(1), 1(a), (b), (c),, (d),

Mahathir bin Abdullah (Anand & Associates) for the plaintiff.
Dennis Xavier (K Manoharan with him) (K Mano & Associates) for the first defendant.
Chan Kean Li (Yap Kok Kheong with him) (Gibb & Co) for the second defendant.

Varghese George J:

THE GROUNDS OF DECISION (ENCL 12)

[1] Enclosure 12 was an application by the second defendant ('the bank') to strike out the writ and statement of claim, and by that I understood it to mean,

to strike out the bank as the second defendant in the plaintiff's suit.

THE BACKGROUND

[2] The first defendant was the registered owner of a piece of land previously held under Geran 43708, for Lot 1285 (now held under GRN 107852 for Lot 1814 and GRN 107853 for Lot 1815), Mukim 13, Daerah Seberang Perai Utara, Pulau Pinang, and of further three other pieces of land (Lots 186, 796 and 1173) in the same Mukim 13.

[3] It was claimed by the plaintiff that they had on 5 April 2000 entered into a joint venture development agreement ('JVDA') with the first defendant to develop all the above lots of land into a 'residential/commercial estate' with all amenities and facilities.

[4] As it appeared, the land comprised in the previous Lot 1285 (now in Lots 1814 and 1815) had been charged by the first defendant to the bank in 1997 vide No Perserahan Gadaian 8011/97, as security for a loan granted by the bank (previously known as DCB Sakura Merchant Bankers Bhd) to one Woh Heng Development Sdn Bhd (hence a third party charge).

[5] The land comprised in Lot 1285 (now Lots 1814 and 1815) had been scheduled to be sold by a public auction at the instance of the bank on 24 April 2012 (pursuant to the bank's right to proceed with such auction affirmed by an order of the Court of Appeal dated 5 October 2009). Obviously the auction was to enable the bank to recover monies owed to it by the said Woh Heng Development Sdn Bhd.

[6] On the morning of the 24 April 2012, on an urgent application by the plaintiff, I had granted an ex parte injunction restraining the bank from proceeding with the auction until inter parte disposal of the application which was fixed for the 10 May 2012.

The plaintiff did not proceed further with the said encl 4 application and the ex parte order lapsed as of 10 May 2012.

[7] The bank filed their statement of defence to the claim in this action on 23 May 2012 and this encl 12 application was then filed on 20 July 2012.

THE STATEMENT OF CLAIM

[8] The plaintiff's suit against the bank was wholly premised on what was alleged by the plaintiff to be a 'collateral contract' existent as between the

plaintiff and the bank, and/or based on a 'tripartite agreement' as between the plaintiff, the first defendant and the bank.

[9] This was clearly evident from the following paragraphs from the statement of claim:

> 10. Defendan Pertama kemudiannya telah mengemukakan kepada Plaintif surat bertarikh 24.02.2000 yang dikeluarkan olehnya kepada Defendan Kedua yang mengesahkan kelulusan dan kebenaran Defendan Kedua kepada pelaksanaan JVDA tersebut
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> …
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> 17. Plaintif menyatakan bahawa surat bertarikh 24.02.2000 yang dirujuk di perenggan 10 di atas mencerminkan satu perjanjian sampingan tiga pihak di antara Plaintif, Defendan Pertama dan Defendan Kedua, di mana Plaintif telah mengambil alih tanggungjawab Defendan Pertama untuk membayar jumlah RM21,780,000.00 yang dirujuk di perenggan 7 (iv) di atas kepada Defendan Kedua dengan persetujuan, kebenaran atau kelulusan Defendan Kedua.(selepas ini dikenali sebagai 'Perjanjian Sampingan tersebut.')
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> 18. Perjanjian Sampingan tersebut memperuntukkan, di antara lain, bahawa di atas balasan persetujuan Plaintif untuk mengambilalih tanggungjawab Defendan Pertama untuk menyelesaikan jumlah RM21,780,000.00 yang terhutang oleh Defendan Pertama kepada Defendan Kedua berkenaan dengan pinjaman yang dirujuk di perenggan 8 di atas iaitu jumlah prinsipal pinjaman tersebut sahaja, Defendan Kedua telah bersetuju bahawa Defendan Pertama boleh memasuki JVDA tersebut dengan Plaintif.
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> 19. Berdasarkan kepada kandungan perenggan 18 di atas, plaintiff menyatakan bahawa secara ternyata dan/atau tersirat, Defendan Kedua telah bersetuju bahawa hak untuk menebuskan Gadaian yang dirujuk di perenggan 8 di atas adalah terletak dengan Plaintif.
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> 20 Plaintif menyatakan bahawa kewujudan Perjanjian tersebut juga dicerminkan melalui tindakan Defendan Kedua untuk membenarkan kaveat persendirian Plaintif terus didaftarkan ke atas tanah tersebut dari tahun 2008 sehingga ke sekarang, tanpa membuat apa-apa permohonan untuk membatalkan kaveat tersebut dan/atau tanpa mendesak Defendan Pertama untuk membuat permohonan untuk membatalkan kaveat tersebut.

[10] The plaintiff sought for declarations to the effect that the alleged 'collateral contract' was valid and binding and the plaintiff was entitled to redeem the charge over the land in question (in the place of the first defendant). The plaintiff also prayed for a statement of accounts to be provided by the bank as to the sums owing in respect of the charge over Lot 1285 and a date to be fixed by the court for the redemption sum to be settled by the plaintiff.

[11] The bank in their pleaded defence denied the existence of any such 'collateral agreement' or 'tripartite agreement' as alleged by the plaintiff.

[12] In so far as encl 12 was concerned, the plaintiff in opposing the bank's application raised basically three grounds why it should not be allowed. They were:

(a) encl 12 on the face of it, was defective, in that rules of procedure cited therein was 'Aturan 18 Kaedah 19(b)(c) and (d)' Rules of High Court 1980 ('RHC 1980') and not *A 18 k 19(1)(b)–(d)*, as it should have been;

(b) the bank's application for all intents and purposes was on the basis that there was 'no cause of action' disclosed against the bank, and as such, the determination to be made by the court should be confined to an examination of what was in the pleadings with no reference made to contents of any affidavit filed; and

(c) the issue of whether or not there was in existence a 'collateral contract' (between the plaintiff and bank) should be determined at the full trial of the matter and not summarily.

WAS ENCL 12 DEFECTIVE

[13] As for me, the omission of inserting the sub-r (1) after 'Kaedah 19' on the face of encl 12 was, as it was obvious, a typographical slip. To all and sundry familiar with court processes, there was no disputing the fact that the bank's application was being brought under O 18 r 19(1) of the RHC 1980. The technical defect was no cause for the plaintiff or their solicitors to be confused or misled as to the nature of the bank's application to be met by the plaintiff.

I therefore did not find this to be a sufficient reason to disallow bank from proceeding with their application in encl 12.

[14] Order 1A of the RHC 1980 (or for that matter the current Rules of Court 2012) provided that the court in administering the Rules of Court, were to have regard to the overriding interest of justice and not just technical non-compliances or defects.

'NO CAUSE OF ACTION' — WAS THAT THE ONLY GROUND FOR THIS APPLICATION?

[15] It was explicit from encl 12, that the bank's application was being made pursuant to sub-subrules ' (b), (c), and (d),' of O 18 r 19(1), that is to say, on the basis that the plaintiff's suit against the bank was unsustainable for any one or more of the following reasons:

(a) it was scandalous, frivolous or vexatious;

(b) it would prejudice, embarrass or delay the fair trial of the action; and

(c) it was otherwise an abuse of the process of court.

[16] Counsel for the plaintiff however wanted the court to ignore that and it was argued that the net effect of the bank's complaint in this application to strike out was that there was 'no cause of action' disclosed against the bank. As such it was further contended that, based on established case-authorities, no material in any affidavit filed should be taken into consideration by the court in deciding the application in encl 12.

I could not agree to this stance taken by the plaintiff's counsel. Enclosure 12 application of the bank, as noted above, was specifically brought seeking relief under sub-subrule (b)–(d) of O 18 r 19(1). Sub-subrule (a) ('no cause of action') had been specifically excluded and not relied upon by the bank in respect of this application to strike out.

[17] The plaintiff's attempt to persuade the court to take a restrictive approach as above was obviously to exclude reference by the court to material adduced in or documents annexed to affidavits which, which might be adverse to the plaintiff.

[18] It was then submitted by counsel for the plaintiff, citing the High Court decision in *Mohamed Moidu b Mohamed & Anor v Hassan b Kadir & Ors* [1997] MLJU 31 as authority, that a party, like the bank here, in applying to strike out the action on the grounds of O 18 r 19(1)(b) and/or (d) had to identify particular averments in the statement of claim that were said to be 'scandalous' or 'vexatious' or frivolous' or 'otherwise an abuse of the process of court'. This, it was argued, had not been adhered to by the bank and the application had therefore to be disallowed outright.

This too, in my view, was an objection based on 'procedural non-compliance' if at all.

In any event, with respect, I did not agree that the effect of that decision of the High Court cited by the plaintiff's counsel was to impose a strict, absolute or overriding requirement in all cases to specifically identify the supposedly impugned parts of a statement of claim and to have them specifically set out in the affidavits in support filed by the party seeking to strike out the action.

[19] Perhaps, in cases where the application was to strike out or expunge scandalous or vexatious material in any pleading, there could arguably arise, a necessity to specifically identify the impugned parts of the pleadings filed and to provide reasons for wanting to strike out the same.

However when the court was called to consider whether an action was 'frivolous' or 'vexatious' or amounted to 'an abuse of process of court', it would necessarily demand an assessment by the court of the whole of one's case that was being challenged, or in other words, the determination was to be on the

totality of the case before the court. Whether it was a plain and obvious case to strike out could only be meaningfully decided if the overall thrust of one's case was scrutinised by the court, and this was not to be artificially limited to a paragraph by paragraph analysis of the pleadings.

[20] Further, 'frivolous or vexatious' carried the meaning that it was obviously unsustainable, and 'abuse of process of the court' referred to situations when the courts machinery was not being used for 'bona fide' reasons. Such effect to be drawn did not dependant on particular pleaded paragraphs of the statement of claim but had to be determined with reference to all of the pleadings and material placed before the court even by way of affidavit-evidence.

[21] Therefore, the plaintiff's attempt to forestall the court on those two grounds of procedural or technical non-compliance, from considering the substantive issue involved in the bank's application, was found to be unmeritorious and rejected by me.

THE COLLATERAL CONTRACT

[22] What was a collateral contract? In what circumstances would a collateral contract arise?

The leading authority referred often in our courts on the subject of 'collateral contract' was the Federal Court judgment of Raja Azlan Shah CJ (as His Royal Highness then was) in *Tan Swee Hoe Co Ltd v Ali Hussian Bros* [1980] 2 MLJ 16 (FC), where (where after a review of various English decisions) it was observed:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract overrides any inconsistent written agreement. This devise of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead, it constitutes a separate contract that exists side by side with the main agreement.
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> …
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> …
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> We do not see how the appellants can escape from the bond of oral promise which was given and which seems to us to have been given for perfectly good consideration.

[23] Visu Sinnadurai J in *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Contraction Sdn Bhd* [1993] 3 MLJ 433, commenting on the features of a 'collateral contract' noted as follows:

> A collateral contract, by its very nature, exists side by side with the main contract. It does not have the effect of substituting the main contract. A collateral contract merely confers certain other rights which are not incorporated in the main contract. But such rights must be related to the rights and obligations of the parties under the main contract There cannot be a collateral contract without the main contract being in existence.

In the same case Visu Sinnadurai J went on to also state:

> It is an established principle of law that the burden of proving the existence of a collateral contract is on the party alleging its existence.

[24] Both the above decisions were referred to by the Singapore Court of Appeal in *Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd* [1999] 1 SLR 14 where it was held that there must be a concluded main contract in the first place, for any collateral contract to arise or exist. In that case, the appeal was allowed because there was no concluded 'agreement to lease' between the same two parties for the collateral promise (contract) as alleged to come into existence.

In that decision it was further observed:

> The main contract may be between the same parties as the collateral contract, or it may be between a third party and one of the parties to the collateral contract (see *Strongman Ltd v Sincock* [1955] 3 All ER 90) …

[25] I have checked out the decision of the English Court of Appeal in *Strongman*'s case but on the facts there the parties to the collateral contract upheld there (between an architect and a builder, and where the architect was the party contracting the builder to undertake construction in violation of then applicable planning requirements) and the main contract was the same parties (not a third party). *Strongman*'s case, in my reading was an authority only for the proposition that a collateral contract could arise and exist notwithstanding that the main contract was 'illegal' or for an illegal purpose.

[26] In my reading of the law therefore, a collateral contract had to be one between the same parties. A recognised kind of collateral contract, referred usually as 'preliminary collateral', arose where one party induced the other party to enter into the main agreement, without which the main contract would be of little value.

Another accepted form of 'collateral contract' (often referred to as giving rise to 'collateral warranties or promises') was one intended to exist side by side with the main contract supplementing the main transaction, that is, an independently between the same parties setting out specific warranties over and above the written terms of the main agreement.

It had to relate to the rights and obligations of the parties under the main contract (see Visu Sinnadurai J).

[27] The plaintiff's basis for asserting that there was 'collateral contract' with the bank admittedly depended entirely on one piece of evidence. The plaintiff's case was wholly built upon the purported letter dated 2 sent by the first defendant to the bank (in its previous name) exhibited as 'A2' in the plaintiff's own *afidavit balasan* (encl 14). It referred to the JVDA, at that point of time, to be entered into by the plaintiff with the first defendant. The bank was not a party to the JVDA, (which was supposedly the 'main contract'), nor was the bank contemplated to be a party to the JVDA.

[28] Exhibit A2 was a unilateral letter from the first defendant allegedly sent to the bank. For sure, it did not emanate from the bank and there was no proof adduced of any acknowledgement of receipt by or in the least, any proof of delivery of that letter on the bank, if at all. Neither was there produced any other correspondence or document, (contemporaneous or otherwise) which went to confirm the contents of that letter of 24 February 2000 by the bank or which implicated the bank to the matters alleged by the plaintiff.

[29] Further, there was no evidence that between February 2000 and the present that:

(a) the JVDA and power of attorney had been forwarded to the bank either by the first defendant or the plaintiff (as undertaken) in exh A2; or

(b) of any attempt by the plaintiff to settle the redemption sum on the charge, if indeed the plaintiff had 'stepped into the shoes' of the first defendant, as claimed.

The 'power of attorney' (executed at the same time of the JVDA on 5 April 2000) too, appeared to have only been registered with the High Court in 2009.

[30] The contents of the letter of 24 February 2000 definitely did not, even on a prima facie basis, bear out 'persetujuan, kebenaran dan atau kelulusan' of the bank (para 17 statement of claim), or that the bank 'telah bersetuju bahawa (1st Defendant) boleh memasuki JVDA tersebut dengan Plaintif' (para 18 statement of claim) or that the bank '… telah bersetuju bahawa hak untuk menebuskan Gadaian … adalah terletak dengan Plaintiff' (para 19 statement of claim).

[31] It is crucial to recall and set out the proper perspective of the 'third party charge' — security arrangement that was existent in the particular circumstances of the case here. The money owed to the bank ('the creditor') under the charge, in this case, was by Woh Heng Development Sdn Bhd ('the debtor') and not the first defendant. If the debt was to be taken over and settled

by the plaintiff, it should have been Woh Heng Development Sdn Bhd, who would be the proper party to request the bank, if at all, to agree to any substitution of the debtor. Further, such a 'rearrangement' it at all, ought to normally be secured through an express tripartite novation agreement involving the creditor, the original debtor and this substituted debtor. Here there was no mention nor was the true or original debtor implicated in the claimed 'collateral contract', which allegedly shifted the obligation to settle the debt to the plaintiff.

[32] In law too, the rights and obligations of the parties under the registered charge over Lot 1285 were dictated by the provisions of the National Land Code ('NLC'). The chargor (the first defendant) had no doubt, a right to redeem the charge by payment of the outstanding debt and secure the release of the charge but until so paid and settled the benefit of the security over the land remained at the instance of the chargee (the bank) always.

There was no provision in the NLC that allowed the chargor or the ultimate debtor (in a third party charge situation) to transfer responsibility for settlement of the debt to another in such summary fashion; a fresh third party charge would have had to be executed in substitution, if at all, the effect as contended for by the plaintiff was to be legitimate and valid, in the specific factual context of this matter.

Under the provisions of the NLC, it was only the chargee (the bank), who was allowed to transfer the benefit of the charge to another (s 219 of the NLC), not the chargor, at all.

THE CONCLUSION

[33] It was my conclusion therefore, that the letter of 24 February 2002 by itself, from the perspectives of both of essential facts and in law, could not and did not per se establish any contractual relationship directly between the plaintiff and the bank, to ground this action against the bank.

There was nothing else shown to the court that even remotely lent any credible support to the assertion of the plaintiff that there was in existence a 'collateral' or 'tripartite' contract binding on the bank.

[34] No 'collateral contract' as alleged had come into existence by virtue of that one letter of 24 February 2000 as canvassed for the plaintiff. It was a farfetched smokescreen to frustrate the bank from proceeding with their statutory rights to foreclose the security held by the bank over the land in question.

The plaintiff's case against the bank was in my assessment, doomed to failure even if it was ordered to be fully tried. It was obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3

MLJ 36; [1993] 2 AMR 34)) and therefore an abuse of the process of court and a wholly frivolous action brought by the plaintiff as against the bank.

I therefore allowed the bank application, which in effect was to order that the bank cease to be a party in this writ filed by the plaintiff.

Application allowed.

Reported by Ashok Kumar